No. 82-388

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In The

Supreme Court of the United States

LOUIS IPPOLITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

When a Sixth Amendment claim to denial of effective assistance of counsel is made, and the federal courts are in conflict, is the correct remedy, when the request is made prior to trial, to hold an evidentiary hearing to ascertain whether a conflict exists and whether the defendant may have been prevented from receiving the quality of representation guaranteed by the Sixth Amendment?

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No.

In The

Supreme Court of the United States

October Term, 1982

LOUIS IPPOLITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Louis Ippolito, petitioner, by his attorney, Michael Rosen, respectfully shows as follows:

OPINIONS BELOW

The opinions of the district court were delivered orally from the bench and are spread on the court reporter's minutes but are

not otherwise reported. *United States v. Louis Ippolito*, No. 80-CR-475-1 (E.D.N.Y., Proceedings 6/22/81; 10/16/81).

The memorandum opinion of the circuit court below is not reported in the slip sheets of that court nor in the official reporter. It is reprinted in the appendix hereto, page 1a, *infra*. The order denying rehearing was issued on August 3, 1982.

JURISDICTION

The date of judgment of the United States Court of Appeals for the Second Circuit was June 14, 1982. A timely petition for rehearing was denied on August 3, 1982. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution are involved in this case. These constitutional provisions are set out in the appendix hereto (00a).

STATEMENT OF THE CASE

Petitioner Louis Ippolito, on April 12, 1979, along with fifteen named defendants, was indicted (No. 79-CR-226) for a far flung narcotics conspiracy and various substantive offenses. According to the Government, the conspiracy embraced a period from approximately January of 1970 through April of 1977 and included the unlawful importation and distribution of marijuana, hashish and cocaine. Prior to trial, seven defendants entered pleas of guilty and agreed to cooperate with the Government. Among these were Donald Brown, Alan Seyfert, Robert Seyfert and Frank Natiello, all of whom had been represented at some stage of the proceedings by Stanley Arkin, Esq.

In February 1979, petitioner was contacted by Brown, the first-named defendant in Indictment 79-CR-226, who advised him to retain Arkin (A75).* Arkin and petitioner met in Los Angeles. Arkin received a substantial retainer (A75) after having informed petitioner of the impending indictment and was also retained to represent petitioner in certain matters arising in Florida (A158).

Arkin had been connected with Robert Seyfert and Natiello since 1973, representing them in two cases in 1976 and 1977 where he arranged plea bargains and cooperation with the Government. Arkin further developed his attorney relationship with members of a central group of individuals allegedly involved in narcotics importation in 1978, when he was introduced by Alan Seyfert to Brown. The three men discussed the then on-going DEA investigation, in which Messrs. Brown, Alan and Robert Seyfert, Natiello and others were targets.

When petitioner was ultimately arrested in Los Angeles as a result of the instant indictment, he was represented by Burton Marks, Esq., an associate of Arkin. Thereafter, Arkin appeared on behalf of petitioner at the bail application and initial plea on Indictment No. 76-CR-226 on April 30, 1979. On or about April 24 (A183), A.U.S.A. Behm, the Government prosecutor, contacted Arkin and his partner Mark Arisohn, Esq. (Arkin and Arisohn, P.C.), in an attempt to obtain a cooperation agreement (subsequently obtained) with Brown. Other defendants represented by Arkin at the time of indictment executed a waiver as to the possibility of conflict of interest; petitioner did not (A266-267, 291).

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* "A" references are to the appendix submitted to the United States Court of Appeals for the Second Circuit.

Petitioner, with the belief that Arkin planned to protect his long-time clients, obtained new counsel on May 18, 1979. Subsequently, seven of petitioner's co-defendants, including Natiello, Robert Seyfert and Alan Seyfert, who were all represented by Arkin's firm (Arkin and Arisohn, P.C.) and Brown pleaded guilty pursuant to an agreement which required they testify in the trials of their co-conspirators.

Prior to trial on the charges contained in the indictment (No. 76-CR-226), new counsel for the petitioner, Michael Critchley, Esq. moved (A64) for dismissal of the indictment and an evidentiary hearing on the ground that Arkin's multiple representation of the various defendants in the instant case had rendered nugatory the petitioner's right to a fair trial. Petitioner also claimed that serious breaches of confidence between himself and Arkin had occurred.

Submitted in connection with that motion were conflicting affidavits (A67, 181). The essence of petitioner's contentions was that surreptitious tape recordings involving defendants and their counsel had been made (A80-82, 95-156, 181-186A) and that disclosure to the Government of other information had been obtained by a breach of trust in the attorney-client relationship between petitioner and Arkin (A181-186). The Government, in addition to admitting that a cooperation agreement had been offered to Brown (A183), prior to Arkin representing petitioner, also admitted to the existence of tape recordings of conferences at which a defense attorney was present (A153). All conversations by the petitioner with Arkin were intended to be strictly confidential. Petitioner's motion was denied.

Petitioner proceeded to trial with seven other defendants. This trial resulted in a hung jury. Petitioner was then tried on a new indictment (No. 80-CR-475), which contained an additional count relating to 1979 drug-related charges, information of which

the Government obtained from Arkin's former client, Brown (A16). A judgment of conviction was entered in the United States Court for the Eastern District of New York (Neaher, J.). As a result of the conviction, the petitioner was sentenced for a period of eight years.

REASONS FOR GRANTING THE WRIT

This case presents for review an important question that has not, but should be decided by the Supreme Court, and as to which the federal courts are in conflict.

The question pertains to the fundamental nature of the right to counsel in the adversary system and society's interest in preserving the institutional structure while making effective assistance an indispensable predicate to that institutional integrity.

Society's faith in the legal system functions primarily on the belief in the confidentiality and confidence of effective legal counsel. It is only with clear guidelines from the Supreme Court that lower federal courts can recognize their responsibilities for fashioning standards on effective assistance of counsel.

I.

A claim of ineffective assistance of counsel has been made, the burden of disproving prejudice arising from the violation of the Sixth Amendment falls on the Government. An evidentiary hearing is necessary to establish that such a violation has not occurred.

The Sixth Amendment of the United States Constitution guarantees that "(in) all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This right contemplates an attorney devoted solely to

the interest of his clients, whose advocacy is unimpaired or untrampled by any conflict of loyalities. *Glasser v. United States*, 315 U.S. 60 (1942). This basic right to effective counsel stems from the initiating of criminal prosecutions.

This court has recognized the necessity of having effective counsel in the early critical stages of a trial. From the time of arraignment until the beginning of trial when consultation, thorough-going investigation and preparation are vitally important. *Powell v. Alabama*, 287 U.S. 45 (1932).

The Supreme Court has clearly stated that disclosures of confidential information by a defense counsel would be a breach of lawyer-client confidentiality and a denial of effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335 (1979).

A potential conflict of interest may arise when a lawyer or law firm represents two or more clients in the same indictment. Some circuits have indirectly concluded that a court may not disqualify an attorney from representing multiple defendants before a grand jury without establishing proof of an actual conflict of interest. The D.C. Circuit concluded that though an attorney represented a number of witnesses before the grand jury and some of the witnesses took the Fifth Amendment before the grand jury, this was not sufficient evidence to disqualify the attorney absent a hearing before the court of whether the Fifth Amendment was properly invoked by the witness. *In re Investigation Before April 1975 Grand Jury*, 174 U.S. App. D.C. 268, 531 F. 2d 600, 608 (1976). The Third and Fourth Circuits also refused to find that they had to disqualify attorneys involved in multiple representations before the grand jury absent a showing of actual impediment of the grand jury investigation. *Matter of Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009, 1012 (3rd Cir. 1976); *Lynchburg Grand Jury*, 563 F. 2d 652 (4th Cir. 1977).

The Second Circuit's standard of inquiry into a joint representation situation has been adopted wholeheartedly in the Federal Rules of Criminal Procedure. Rule 44(c) provides, *inter alia*, that it is the duty of the federal courts to:

> " . . . promptly inquire with respect to . . . joint representation and (they) shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the Court shall take such measure as may be appropriate to protect each defendant's right to counsel." Federal Rule of Criminal Procedure 44(c).

The Second Ciruit in *United States v. DeBerry*, 487 F. 2d 448 (2d Cir. 1973) noted "(t)he rule in the circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied effective assistance of counsel" *citing United States v. Lovano*, 420 F. 2d 769, 773 (2d Cir. 1970).

Petitioner submits that prior to trial he requested a hearing to lay bare the full particulars of the acts involving Arkin and his other clients (A64). An affidavit (A67) by Richard Sherman, Esq. provided information that, upon his own investigation, sufficient grounds existed to believe that Arkin was in breach of the lawyer-client relationship and that petitioner had been denied effective assistance of counsel. In opposition, the Government admitted to the existence of tape recordings that were in breach of attorney-client privilege and the fact that Brown had been asked to be a cooperating witness a week before Arkin represented petitioner at his bail hearing and the arraignment. At the time

the indictment was returned Arkin represented five of the defendants. Just on this fact alone, the potentiality for prejudice was staggering and was demonstrated in the moving affidavit, the potentiality for prejudice to the petitioner was fully realized when Arkin arranged to have his four other clients cooperate with the Government and thus against his former client, the petitioner.

The right of effective counsel has generally been looked upon in terms of attorney competence. At no time has the issue of Arkin's competence come into question. The right to effective counsel that petitioner claims is the more basic fundamental mandate that an attorney-client relationship is always in the strictest confidence.

When dealing with the question of attorney competence, the circuits are in conflict. Two circuits, the Second and the Tenth, have retained the "farce and mockery" formulation. *See United States v. Burbar*, 567 F. 2d 192 (2d Cir. 1976), *cert. denied*, 434 U.S. 872 (1977); *United States v. Larsen*, 525 F. 2d 449 (10th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976). Nine circuits have explicitly rejected that standard and have adopted some variant of "reasonable competence" or "customary skill" test. *See Marzullo v. Maryland*, 516 F. 2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *Moore v. United States*, 423 F. 2d 730 (3rd Cir. 1970).

Judge Bazelon in *United States v. DeCoster*, 487 F. 2d 1197 (D.C. Cir. 1973) (*DeCoster I*) noted:

> "A defendant is entitled to the reasonable competent assistance of an attorney as his diligent conscientious advocate" *Id.* at 1202.

Urging the courts to consider the foregoing of a revised standard of government appellate review of ineffective assistance claims,

Judge Bazelon provided specific guidelines based on the American Bar Association's Standards for the defense function as the minimal components of "reasonably competent assistance."

Similarly, the guidelines to lower courts for competency are in conflict. The petitioner respectfully requests that the Supreme Court resolve the conflict that exists within the circuits as to how lower courts resolve whether an attorney-client violation with regard to the betrayal of attorney-client confidences should be handled once such a claim has been made.

The petitioner respectfully requests that this Court resolve the conflict in the circuits by ruling that upon the showing of such prima facie evidence of ineffective assistance of counsel, the lower courts be mandated to hold evidentiary hearings when this Sixth Amendment right has been compromised. Judge Bazelon dissenting in *United States v. Decoster,* No. 72-1283 (D.C. July 10, 1979), *cert. denied,* 100 S. Ct. 302 (1979) stresses the distinction between the constitutional inquiry into the ineffectiveness and the prejudice inquiry. The constitutional violation, he maintained "can exist regardless of the impact: if the defendant's counsel has substantially failed to exercise a minimum duty, there is a Sixth Amendment violation" Slip Op. at 5 (Bazelon, J. dissenting).

Without an evidentiary hearing, defense counsel's inadequacy cannot be gauged, for it will not be clear whether the prosecutor will prove its case because of or in spite of defense counsel's default. Just as the burden is on the prosecution at trial to prove every element of its case beyond a reasonable doubt, the burden should remain on the prosecution once a substantial violation of defense counsel's duty has been found, to show beyond reasonable doubt that the lawyer's failings did not affect the verdict, or, in effect, that it did in fact prove its case.

The Third Circuit Court of Appeals spoke very clearly on establishing guidelines for the determination of the point in time when a potential conflict of interest is transformed into an actual conflict of interest in *Matter of Grand Jury Empaneled January 21, 1975, supra.* That point in time was held to be whenever the Government communicates to the attorney that it desires to offer immunity to any of his clients. The D.C. Circuit espoused a similar view in *In re Investigation Before April 1975 Grand Jury, supra.*

The Government in its opposing affidavit (A183) acknowledges that indeed it had discussed with Arkin the cooperation of Brown against petitioner prior to Arkin's represenation of petitioner on April 30, 1979.

Petitioner's claim to breach of his Sixth Amendment right could only have been investigated by the probing of a judge at an evidentiary hearing. An attorney-client privilege exists from the first meeting and the confidence in absolute secrecy is a cornerstone in our judicial system. A client has a right to know of any conflicts of interests that may exist when he engages the trust of an attorney. Arkin had been associated with some of the subsequent cooperating clients since 1973. He had obtained plea and cooperation agreements with the Government for them in prior cases. He was very much aware of his conflict of interest in being retained by the petitioner just two months before the return of Indictment No. 76-CR-226. It is only at a hearing that Arkin could have explained what his motives may have been and whether or not he fully advised petitioner of what would appear to be an obvious conflict of interest.

An evidentiary hearing was the only vehicle open to the petitioner to establish that his rights had been violated. There could be no prejudice to the court to hold such an inquiry. An exchange of conflicting affidavits is not sufficient when a defendant has made a substantial claim to a Sixth Amendment denial of right to effective counsel.

CONCLUSION

For the reasons set forth herein, it is urged that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MICHAEL ROSEN
Attorney for Petitioner

APPENDIX

JUDGMENT/ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

81-1357

At a States Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of June, one thousand nine hundred and eighty-two.

Present:

Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. James L. Oakes,
Circuit Judges.

United States of America,
Appellee,

v.

Louis Ippolito,
Appellant.

ORDER

Louis Ippolito appeals from a judgment of conviction on charges of distributing and possessing with intent to distribute

marijuana, 21 U.S.C. §841(a)L1); 18 U.S.C. §2, and conspiracy to import and distribute marijuana, 21 U.S.C. §8846, 963, following a jury trial in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge*. We affirm.

Appellant's principal argument is that the district court erred in denying a hearing on whether disclosures to the government by Ippolito's former defense counsel violated due process or the right to effective assistance of counsel. Before the trial commenced, Ippolito moved for dismissal of the indictment or any other appropriate remedy, because of improper breaches of lawyer-client confidentiality by Stanley Arkin, Esq., who had been Ippolito's defense counsel during the early pre-trial period, and the prosecutor's knowing exploitation of information obtained by way of Arkin's indiscretion. The gist of Ippolito's allegations was as follows: Arkin and his firm had represented various of the alleged conspirators for a substantial period of time prior to the indictment. He was introduced and became counsel to Ippolito in February 1979, around the time of the original (April 12, 197) [sic] indictment (later superseded by an almost identical indictment) in the instant case. Arkin is said subsequently to have disclosed to other of his clients, including Robert Seyfert, information that had been revealed to him in confidence by Ippolito, though we are not advised what this information was. Arkin and Seyfert are then said to have disclosed such information to the prosecutor, including conversations between Ippolito and his counsel that had surrepitiously been tape recorded by Seyfert, in order to obtain a more favorable plea bargain for various of Arkin's clients, including Robert Seyfert, Alan Seyfert, and Frank Natiello. The prosecutor is said to have accepted the information knowing that its disclosure was a breach of attorney-client confidentiality.

Appendix

In opposition to Ippolito's motion, the Eastern District of U.S. Attorney submitted an affidavit in which he outlined his office's participation in the case and indicated that, as far as he was aware, neither Arkin nor any member of his firm had disclosed information obtained from Ippolito to him or any other government official, including anyone involved in the case in the U.S. Attorney's office in the Western District of Texas. Following oral argument, Judge Neaher denied the defendant's motion without allowing a hearing with respect to the extent of improper disclosures and the government's involvement.

Unauthorized disclosures of confidentiality information by Ippolito's former defense counsel would have been a breach of lawyer-client confidentiality and possibly a denial of effective assistance of counsel. *Cf. Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1979) (conflict of interest on part of defense counsel). But Ippolito's vague allegations in advance of trial—that Arkin's misconduct resulted in the prosecutor's acquisition of inculpatory evidence that would not otherwise have been obtained and that the evidence contributed to the prosecutor's case against Ippolito—were not sufficiently colorable to warrant a full evidentiary hearing on the issue. The allegations were wholly conclusory; nowhere did they set forth the nature of the confidentiality information, or how and when it was confided to or disclosed by Arkin. Therefore, the district court's denial of defendant's motion without a hearing was not an abuse of discretion.

We also find little merit to appellant's other argument. The testimony of Special Agent Chambliss, to which defendant objected as "bad character" evidence under Fed. R. Evd. 404(b), was properly admitted as direct proof of defendant's involvement in the marijuana conspiracy. The inclusion of an additional count

in the superseding indictment was also permissible, since it did not in any way evidence prosecutorial vindictiveness or "chill" defendant's right to stand trial.

Judgment affirmed.

Circuit Judges.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Constitution of the United States:

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment for a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."